IN THE

# Supreme Court of the United States

October Term, 1973 No. —

FRANK L. RIZZO, MAYOR OF THE CITY OF PHILADELPHIA, et al., POLICE COMMISSIONER JOSEPH F. O'NEILL, et al.,

*Petitioners*

*v.*

STEVEN G. FARBER, et al.,

*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT


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*Petitioners*

*v.*

STEVEN G. FARBER, et al.,

*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 26, 1973, qashing petitioners' appeal from an interlocutory contempt decree issued by the United States District Court for the Eastern District of Pennsylvania; finding several named and unnamed defendant police officers guilty of violating a temporary restraining order.

## OPINIONS BELOW

The order of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinions and orders rendered by the United States District Court for the Eastern District of Pennsylvania, not yet reported, appear in the Appendix hereto.

## JURISDICTION

The order of the Court of Appeals for the Third Circuit was entered on September 26, 1973. This Petition for Certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

## STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Civil Procedure, Rule 10(a):

> Caption; Names of Parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties,

but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Federal Rules of Civil Procedure, Rule 15(a), (b):

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in

maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

## QUESTIONS PRESENTED

I. Whether the Third Circuit Court's quashing of an appeal of a contempt decree against persons who were not parties to the contempt proceeding is in conflict with applicable decisions of this Court and with the United States Constitution.

II. Whether the Third Circuit Court's tacit acceptance of the use of "John Doe" pleadings raises important questions involving the Federal Rules of Civil Procedure and such are in dispute among the circuits.

## STATEMENT OF THE CASE

On October 20, 1972, Independence Hall and the surrounding area was the site of a visit by Richard M. Nixon, the President of the United States and Spiro Agnew, then the Vice President of the United States, Frank L. Rizzo, Mayor of the City of Philadelphia, and a great number of other high public officials including senators, governors, and congressmen. (N.T. 577). The President came to Philadelphia to utilize Independence Hall as a symbolic backdrop for the signing of the Revenue Sharing Act. He chose this site, the building in which the Constitution of the United States was drafted, to emphasize the significance of this bill to the concept of federalism established by the Constitution.

In anticipation of the ceremonies to take place at Independence Hall, the Police Department of the City of Philadelphia, in conjunction with federal authorities, established a secured area for the purpose of excluding members of the general public from the close proximity to the President of the United States and other public officials arriving to attend the ceremonies. The Police Department had been given information by previously reliable sources that certain persons planned to force a physical confrontation with the President of the United States. (N.T. 637, 634, 606, 658, 663, 664, 668, 673, 688).

Various dissidents did, in fact, gather at this time, directly across from Independence Hall, to disrupt these proceedings and also attract public attention to their disagreement with our national goals and aims in Southeast Asia and more particularly, to voice their opposition to the now concluded war there.

During the morning of October 20, 1972, various individuals filed a complaint and motion for a temporary restraining order (TRO) against Frank L. Rizzo, George Fencl, and "John Doe and Richard Doe" alleging First Amendment infringements. The TRO was granted at 12:40 P.M. by the Honorable Daniel H. Huyett, 3rd.

On October 27, 1972, these individuals and others filed a petition for civil contempt alleging violations of the TRO. This complaint was amended on November 8, 1972 to include Frank L. Rizzo, Joseph O'Neill, George Fencl, William Lindsay, John Rich, City of Philadelphia and "John Doe and Richard Doe."

After a six day hearing, transcription of the testimony and briefs, Judge Huyett filed an opinion and order on June 22, 1973, holding petitioners in civil contempt of court. On June 29, 1973, Judge Huyett filed a subsequent order and opinion in conformity with the June 22 order, but postponed the imposition of damages until final disposition of the civil action.

In his order, Judge Huyett not only found the named defendants, excluding Rizzo, in civil contempt of court, but also several policemen,[1] heretofore identified as John Does, were also held in contempt. However, these individuals were never made parties to the contempt proceedings.

That is, plaintiffs below never amended their complaint to include these individuals as parties when their identity became known. Additionally, they have never been served with process and, excluding defendant Carducci, who appeared as a defense witness, were not present at the contempt hearings.

These policemen, as non-parties to the main action, and without right to take an appeal from a final judgment in the instant matter, filed an appeal from Judge Huyett's interlocutory order. Plaintiffs below filed a motion to quash this appeal and the Third Circuit granted this motion on September 26, 1973.

Your petitioners now come before this Honorable Court as persons adjudged, *in absentia*, guilty of contempt of court, and denied their opportunity to appeal this finding.

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1. Petitioners include the following policemen: Martin Kelly, William Hughes, Ned Wimberly, Melvin Jones, O'Donnell, Ellsworth Kiehn, John Founds, Raymond Weldon and Michael Carducci.

## REASONS FOR GRANTING THE WRIT

### I. The Third Circuit Court's quashing of an appeal of a contempt decree against persons who were parties to the contempt proceeding is in conflict with applicable decisions of this Court and with the United States Constitution.

Generally, a civil contempt order, without assessment of damages, is interlocutory and reviewable only upon an appeal taken from a final judgment or decree in the civil suit. However, Judge Huyett's order, holding the heretofore named police officers in contempt of court for violating the temporary restraining order is a judgment against persons who are not parties to the litigation and, consequently, is final and appealable.

The non-party status of these individuals arises from the fact that plaintiffs below utilized a "John Doe" complaint to identify these police officers. Yet, when their identity became known, plaintiffs failed to amend their complaint so as to identify, as parties, the persons whom they were charging with violation of their constitutional rights. Assuming arguendo, the validity of "John Doe" complaint in federal practice,[2] under Federal Rule of Civil Procedure 15, plaintiffs below had the affirmative duty to amend their pleadings to conform to the evidence. *Johnson v. Udall*, 292 F.Supp. 738 (D.C.Cal., 1968); *Hannah v. Majors*, 35 FRD 179 (D.C.Mo., 1964). See also, *Kentucky Silver Mining Co. v. Day*, 14 Fed. Cas. 315 (No. 7719) (C.C.Nev. 1873).

A non-party's right to appeal an interlocutory contempt decree has been presented to and addressed by this Court before. It is a well established principle that, as to non-parties, such a contempt decree is final and appealable. This follows from the fact that a non-party cannot appeal from the final judgment in the action. *Bessette v. W. B. Conkey*

2. The validity of "John Doe" pleading is discussed in Point II.

*Co.*, 194 U.S. 324, 48 L.Ed. 997, 24 S.Ct. 665 (1904); *Re Christensen Engineering Co.*, 194 U.S. 458, 48 L.Ed. 1072, 24 S.Ct. 729 (1904) (recognizing rule); *Doyle v. London Guarantee & Acci. Co.*, 204 U.S. 599, 51 L.Ed. 641, 27 S.Ct. 313 (1907) (recognizing rule); *McCrone v. United States*, 307 U.S. 61, 59 S.Ct. 685, 83 L.Ed. 1108 (1938) (recognizing rule); *Nye v. United States*, 313 U.S. 33, 61 S.Ct. 810, 85 L.Ed. 1172 (1940) (recognizing rule); *Alexander v. United States*, 201 U.S. 117, 26 S.Ct. 356, 50 L.Ed. 686 (1906) (rule applied to witness).

More recent lower court cases, citing the same proposition, include: *Southern v. Lanham*, 403 F.2d 119 (5th Cir. 1968); *Hyde Const. Co. v. Koehring Co.*, 348 F.2d 643 (10th Cir. 1965), *reversed on other grounds*, 382 U.S. 362. See also *9 Moore's Federal Practice* §110.13(4), p. 167; Wright, "*The Interlocutory Appeals Act of 1958*," 23 FRD 119, 200.

The case of *Fenton v. Walling*, 139 F.2d 608 (1942), is illustrative of the questions of law and fact presented in the case at bar, and clearly shows the error of law which the Third Circuit Court committed in quashing petitioners' appeal below. In *Fenton*, the Ninth Circuit Court of Appeals considered an adjudication of contempt against two bank officers for a refusal to obey an order, directed at the bank, issued by a District Court. The bank officers were not parties to the main action. In support of the motion to quash the appeal, appellees argued that the appellants were not strangers to the main action, but rather that legally, and in fact, they represented the defendant-bank. It was claimed that as representatives of the corporate defendant, they stood in the position of a party, notwithstanding that they were not named as such in the complaint, nor were they added by amendment to the complaint. The Circuit Court held that it was a well established fact that a civil contempt adjudication directed toward a person, not party to an action, is final and appealable. The court further held that the individuals held in contempt, since they were not parties to the main cause of action, had no right of appeal from a final judgment in the main action; and, unless they could

obtain review of the contempt adjudication at that time, they would have no right of review at all.

Not only does the reasoning of the *Fenton* decision compel this Court to remedy an error of law, but also the total denial of procedural due process afforded these individuals mandates that this Court grant the petition and review the misuse of the District Court's indirect contempt power. Here, *inter alia*, these individuals have never been served with process; nor have they ever been given notice of or opportunity to appear as parties[3] at the contempt hearing. They have been denied their Fifth Amendment right to confrontation; have been denied their right to present witnesses in their own behalf; and have been denied their right to counsel.

In summary, through the use of its indirect contempt power, the District Court has tried, judged, and found these men guilty *in absentia*. The Third Circuit Court's order now effectively denies these individuals their right to appeal this unconstitutional action.

This arbitrary and capricious misuse of contempt power demands review by this Court. As with the case of direct contempt, which has recently been reviewed and limited, this Court must now establish proper guidelines for the federal judiciary in its use of indirect contempt power.

**II. The Third Circuit's tacit acceptance of the use of "John Doe" pleadings raises important questions involving the Federal Rules of Civil Procedure and such issues are in dispute among the circuits.**

By quashing petitioners' appeal below, the Third Circuit Court of Appeals has presented this Court with an opportunity to clearly define the use of such complaints in

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3. Officer Carducci appeared merely as a witness. The remaining contemners were not physicall present at the contempt hearings.

federal pleadings. Presently, the status of such use is in a state of contradiction and confusion among and within the several circuits.

On this basis alone, this Court should grant the petition; the prime responsibility for the proper functioning of the federal judiciary rests with this Court. The fact that this Court has never definitively ruled on the use of such "John Doe" pleading is attested to by the lack of uniformity in the several circuits regarding this issue.

At common law, it was essential that a person's name appear in a complaint before he could be made a defendant in an action. *Kentucky Silver Mining Co. v. Day*, 14 Fed. Cas. 351 (No. 7719) (C.C.Nev. 1873); *Elmendorf v. Delancy*, 1 Hopk. Cas. 555 (N.Y. 1825); *Wiebbold v. Hermann*, 2 Mont. 609, 611 (1876) (*dictum*); see Stephen *Pleading*, 300 (9th Am. Ed. 1867). In addition, it was essential that the defendant's name, including both his christian name and surname, be correctly stated. *Schofield v. Jennings*, 68 Ind. 232, 234 (1879) (*dicum*); *Wiebbold v. Hermann, supra*. If the plaintiff failed to meet this requirement, the complaint was subject to a plea in abatement and a default judgment entered against the party intended to be sued but only designated in the complaint would be void; *Honeycutt v. Nyquist, Peterson & Co.*, 12 Wyo. 183, 195, 74 Pac. 90, 93 (1903) (*dictum*); 1 Chitty, *Pleading*, 440-41 (1809 Ed.). *Wiebbold v. Hermann, supra*, at 610. If the defendant's name was not known to the plaintiff, no relief was available to him in an action at law; and, if other defendants were properly designated and served, the action would proceed without the unknown defendant.

Equity courts offered some relief by allowing a plaintiff to allege in his complaint that he was ignorant of the names of certain defendants. This constituted an acceptable excuse for not making them parties to the action and prevented the action from being dismissed on this ground. *Fenn v. Craig*, 3 Y. & C. Exch. 216, 160 Eng. Rep. 680 (1838); Story, *Equity Pleadings*, §92 (Redfield Ed. 1865). Such an allegation was still not a ground for making the unknown

defendants parties to the action by the use of fictitious names although it could be used to support a bill for discovery. *Kentucky Silver Mining Co. v. Day, supra*, n. 12 at 352.

There are no federal statutes or rules which expressly allow the designation of unknown defendants by fictitious names. This would appear to preclude the use of fictitiously named parties in the federal court unless (1) the federal rules can be interpreted to permit the designation of unknown defendants by fictitious names or (2) in non-federal cases, state statutes allowing fictitious names for unknown defendants are held to be substantive provisions within the purview of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 Ct. 817, 82 L.Ed. 1188 (1938).

Since jurisdiction of the U.S. District Court was brought pursuant to 28 U.S.C. §§1331, 1343(3), 1343(4), 1651, 2201, 2202, and 42 U.S.C. §§1983, 1985, we are not presented with an *Erie* Doctrine question. Thus, the validity of "John Doe" pleadings must be based on the Federal Rules of Civil Procedure. The relevant federal rule in F.R. Civ. P. 10, Form of Pleading. This rule provides, in pertinent part:

> . . . In the Complaint the title of the action shall include the names of all the parties.

This rule specifically states that the complaint shall contain the name of all the parties. It does not provide for the use of "John Doe" pleadings. In view of the fact that, in the absence of statute, there is no right to sue a party by a fictitious name and that at common law an individual's name consisted of his christian name and surname, it should be concluded that there is no right under federal rules to sue an unknown defendant by a fictitious name.

However, the propriety of designating defendants through fictitious names is a subject of dispute among and within the several circuits.

In a few cases, the practice of designating defendants by fictitious names in Federal District Court appears

to have been regarded with approval where the courts have pointedly addressed their remarks to the propriety of such practice. *Schindler v. Wabash R. Co.*, 80 F.Supp. 685 (D.C. Mo. 1948); *Hannah v. Major*, 35 FRD 179 (D.C.Mo. 1964); *Philip v. U.S.*, 127 F.Supp. 912 (D.C.Cal. 1955) (Admiralty case).

In other cases, the practice of designating defendants by fictitious names in complaints in a Federal District Court has been categorically disapproved. *Sigurdson v. Del Guercio*, 241 F.2d 480 (9th Cir. 1956); *Hall v. Pacific Maritime Asso.*, 281 F.Supp. 54 (N.D.Cal. 1968); *Tolefree v. Ritz*, 382 F.2d 566 (9th Cir. 1967). This is also true in the area of declaratory judgments. The following cases have held, expressly or by necessary implication, that a complaint designating defendants by fictitious names, is subject to dismissal, at least as to such defendants. *Mississippi Barge Line Co. v. Bulk Carriers Ltd.*, 249 F.Supp. 743 (D.C.N.Y. 1965); *Wilder v. Doe*, 30 F.Supp. 869 (D.C.Pa. 1939).

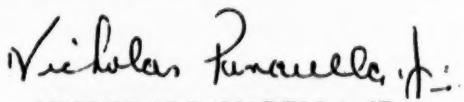
In other cases, courts have disapproved the practice of designating defendants by fictitious names; but, at least by implication, have recognized its use in "unusual circumstances". *Johnson v. General Motors Corp.*, 242 F.Supp. 778 (D.C.Va. 1965); *Molnar v. National Broadcasting Co.*, 231 F.2d 684 (9th Cir., 1956). These cases have generally held that plaintiffs have the affirmative duty of amending their pleadings once the precise identity of the defendants is available. *Johnson v. Udall*, 292 F.Supp. 738 (D.C.Cal., 1968); *Hannah v. Majors*, 35 FRD 179 (D.C.Mo. 1964).

In summary, it can be seen that there is a pressing national need for this Court, which has the responsibility for the proper functioning of the federal judiciary, to establish a definitive ruling with reference to the use of "John Doe" pleadings in federal practice. This is especially true in the case at bar, since it has led to the dire unconstitutional act committed by the District Court which the Circuit Court has referred to review.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and order of the Third Circuit.

Respectfully submitted,



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# APPENDIX

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN FARBER, et al.

*v.* C.A. No. 72-2052

FRANK L. RIZZO, et al.

**ORDER**

And now, to wit, this 20th day of October, 1972, upon consideration of the Complaint, Motion for Temporary Restraining Order and argument of counsel, IT IS HEREBY ORDERED THAT a Temporary Restraining Order be granted against the defendants restraining the interference in any manner whatsoever with the peaceable exercise of the First Amendment rights of plaintiffs and other members of the public which shall include the carrying of signs in any area in the vicinity of Independence Hall where the public is otherwise permitted to assemble.

David N. Nizth J.

A2

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN G. FARBER, et al.

*v.*

FRANK L. RIZZO, individually
and as Mayor of the City of Philadelphia, et al.

Civil Action

No. 72-2052

**OPINION AND ORDER**

HUYETT, J. June 22, 1973

President Richard M. Nixon came to Philadelphia on October 20, 1972 to utilize Independence Hall as a symbolic backdrop for the signing of the Revenue Sharing Act. He chose this site, the building in which the Constitution of the United States was drafted, to emphasize the significance of this bill to the concept of federalism established by the Constitution. Others came to Independence Mall, directly across from Independence Hall, to demonstrate to the President their deep disagreement with this nation's policies in Southeast Asia and the continued war there. Persons were arrested that day while peacefully demonstrating with anti-war signs in an area open to the public, while others were prevented from entering Independence Mall because they had such signs. These actions transgressed the spirit of the Declaration of Independence and the letter of the Bill of Rights, which documents are also closely associated with the buildings on Independence Square.

Plaintiffs filed a Complaint and a Motion for a Temporary Restraining Order (TRO) on the morning of October 20, 1972. The Complaint asserted that they and others had been forcibly prevented by defendants from displaying signs, posters and leaflets opposing the President's policies in Independence Mall (Mall), an area to the north and directly across from Independence Hall (Hall) which was open to the public. The Court, after meeting with counsel for plaintiffs and an Assistant City Solicitor, issued a TRO at 12:40 P.M. which forbade interference with the peaceful exercise of First Amendment rights in areas open to the public near Independence Hall.[1] On October 27, 1972, plaintiffs filed a Petition for Civil Contempt claiming numerous violations of the TRO by the defendants. Several days of hearings were held on this petition.

## FACTS[2]

At approximately 9 P.M. on October 19, 1972, about fifty persons congregated in front of Independence Hall on the south side of Chestnut Street between Fifth and Sixth Streets. They were there to take part in an all-night vigil to protest the continued presence of the United States in Southeast Asia. The impetus for this protest was President Nixon's scheduled visit to Independence Hall

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1. The TRO entered by the Court read:

"And now, to wit, the 20th day of October, 1972, upon consideration of the Complaint, Motion for Temporary Restraining Order and argument of counsel, IT IS HEREBY ORDERED THAT a Temporary Restraining Order be granted against defendants restraining the interference in any manner whatsoever with the peaceful exercise of the First Amendment rights of plaintiffs and other members of the public which shall include the carrying of signs in any area in the vicinity of Independence Hall where the public is otherwise permitted to assemble."

2. This section shall comprise the Findings of Fact required by Fed.R.Civ. P. 52.

the next day. The protestors originally intended to remain in that place through the night and until the President arrived. At about midnight, however, at the request of defendant Lt. George Fencl, commanding officer of the Civil Disobedience Squad, they moved across to the north side of Chestnut Street. The south side of Chestnut Street was then made a "security area" barred to the general public. There was no indication then, or later, that the north side of Chestnut Street was a "security area". The protestors, many of whom had anti-war and anti-Nixon placards, spent the rest of the night in a peaceful manner.

On the morning of October 20, at approximately 7 A.M., Lt. Fencl ordered the persons with signs on the north side of Chestnut Street to leave that area. He indicated that that area would be closed to persons with signs or leaflets and that anyone desiring to demonstrate in that manner would have to go to an area at Fifth and Market Streets, a block away. They were told, however, that if they relinquished their signs and leaflets they could remain where they were. About fifteen minutes later sixteen persons, all of whom are plaintiffs in this case,[3] were arrested by police at the direction of Lt. Fencl. At this time they were peacefully carrying signs and standing on the sidewalk on the north side of Chestnut Street. They were not interfering with either vehicular or pedestrian traffic. Plaintiff Steven Farber, Esquire, who had just arrived at the scene to serve as a legal adviser, picked up a sign dropped by one of the persons arrested. He was arrested when he refused to put down the sign or get out of the area. These persons were all taken to the Police Administration Building where they were fingerprinted and placed in the cell room. No charges were placed against them at that time or later. Anyone who relinquished his sign was permitted to remain in the area.

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3. The persons arrested between approximately 7:15 and 7:30 A.M. included Plaintiffs Freeman, Driscoll, Pratt, Schiller, Day, Brennan, Ravitz, McVee, Seeber, Hardy, Doty, Bye, Avila, Campbell, Windle and Malone.

At approximately 9 A.M. Louis Natali, Esquire, who was representing those persons arrested at 7:15 A.M., engaged in a discussion concerning the persons arrested with Commissioner Joseph O'Neill, Philadelphia Police Commissioner, and Lt. Fencl. Commissioner O'Neill said that persons with signs were limited to the area designated for signs and that those in the area directly across from Independence Hall would be arrested. An agreement was then reached so that those arrested at 7:15 A.M. would be permitted to return to the south side of Independence Mall provided they agreed not to carry signs. Mr. Natali went to the Police Administration Building to relay this proposition to those held in custody. Only plaintiff Farber accepted this offer and he was immediately released. The others refused the conditional release.

Mr. Natali arrived back at the Independence Hall area at approximately 10:30 A.M. and informed Commissioner O'Neill of the results of his discussion. Immediately thereafter the police, at the direction of Commissioner O'Neill and in the presence of Lt. Fencl, arrested sixteen persons, all plaintiffs in this case,[4] who were peacefully standing behind police barricades in an area open to the public. They were all carrying signs against the war or against the re-election of President Nixon. These persons were told that they could remain if they gave up their signs or they could carry them on Market Street. When they refused they were all taken to the Police Administration Building where they were held. They were not informed of any charges against them.

In regard to the arrests on the morning of October 20, 1972, Lt. Fencl had received information from unidentified sources concerning possible "confrontation" or other actions of disruption by the demonstrators. The

4. The persons arrested between 10:30 and 10:50 A.M. were Plaintiffs Puston, Buckalew, Halasa, Klotz, Haydt, Tuckerman, Smiler, Seaman, McHugh, Dickinson, Aldred, Kryszak, Palumbo, Abdoo. There was also a stipualtion that Steven Clark, who is not a plaintiff, was arrested at this time.

informants, however, did not name or describe the persons who would engage in these acts. Lt. Fencl did not learn or attempt to learn what was meant by "confrontation". There was no reason to believe that signs were a part of any plan for illegal activities.

The persons who were arrested during the morning of October 20, 1972, were kept in custody until 4:00 P.M., long after President Nixon and other government officials had left the Independence Hall area. They were effectively denied the opportunity to carry signs or distribute leaflets in Independence Mall during President Nixon's visit. Many of these persons were fingerprinted, searched, interrogated and photographed while in police custody. No contraband or weapons were discovered by police. All of these persons were released without any charges being pressed against them. They were kept in custody despite the issuance of the TRO which specifically covered the activities for which they had been arrested.

At 11:00 A.M. the Complaint and Motion for a Temporary Restraining Order were filed in this Court on behalf of the persons arrested at 7:15 A.M. This Court held an informal hearing in chambers at which Mr. Farber and Mr. Natali described the arrests and the terms of the conditional release offer. Murray Goldman, Esquire, Assistant City Solicitor, representing the defendants, expressed the opinion, based on discussions with Lt. Fencl, that these persons were arrested for being in a walkway which was to be used by visiting dignitaries and was not open to the public. At 12:40 P.M. we issued a TRO, a copy of which was immediately handed to Mr. Goldman.

A request to order the persons arrested to be released was refused. After the TRO was issued Mr. Natali called Lt. Margolis of the Philadelphia Police Department and informed him of the order's contents. He told Lt. Margolis that the persons arrested that morning at Independence Hall should be released. Lt. Margolis refused to release them on the ground that he was awaiting orders from superiors.

Plaintiff Gary Thomas, a member of Vietnam Veterans Against the War, went to Independence Mall at about 1:00 P.M. with a certified copy of the Court's TRO and a banner of his organization. He had been ordered to leave the Mall that morning because he had the banner under his jacket. At 1:00 P.M. he was refused entry to the Mall even after he read the Court order to the officers on duty. Thomas identified the officers as Lt. Rich and Officers Hughes, Wimberly, Jones, O'Donnell, and unidentified officers with badge numbers 4288 and 8552. Thomas' companion, Patrick Rogers, was arrested as he attempted to enter the Mall after he returned the banner to Thomas.

Plaintiff Farber arrived at the Mall at 12:50 P.M. and observed that police were still refusing entry to the Mall of persons with signs even though he informed numerous police officers of the existence of the TRO. When he was not permitted to see Lt. Fencl he returned to the courthouse where he obtained certified copies of the order. Farber then returned to the Mall where he handed copies to Captain Lindsay and Lt. Rich of the Philadelphia Police Department, who were near the corner of Sixth and Chestnut Streets. These officers then conferred with Mr. Goldman who told them that they were not violating the TRO. They returned to the Mall entrance and refused to allow sign carriers into the area opened to the public on the Mall.

Plaintiff Jacqueline Ruttenberg attempted to enter the Mall with a sign at about 1:30 P.M. She had arrived around noon but had remained outside the Mall because she had heard the police were excluding persons with signs. When she tried to get into the Mall a police officer wearing an "E" button[5] refused her entrance and told her

5. There was testimony by Lt. Fencl which established that the men wearing little pins with black letter "Es" were members of the Philadelphia Police Department operating as plain clothesmen that day. These pins were distributed to the officers by the United States Secret Service. Other plainclothes officers were wearing small yellow and blue pins on their lapels.

to give up her sign. She and others were still denied access with signs and leaflets after a copy of the TRO was read and handed to the officers blocking the entrance. Captain Lindsay told them that no one's constitutional rights were being violated.

Plaintiff Linda Backiel, a legal worker, went to the Mall area when she learned that a TRO had been issued. Another person gave her a sign with an anti-war slogan. She heard Lt. Rich inform a person that he could enter the Mall as a private citizen but not with a sign or leaflets. While she watched others with signs being kept out of the Mall a policeman tore her sign from its stick. Among the officers she observed interfering with access to the Mall were Lt. Rich, Officers O'Donnell, Kiehn, Mitchell and badge numbers 9771 and 2752.

Plaintiff Robert Jannet arrived at the corner of Fifth and Chestnut Streets at about 1:15 P.M. with a sign protesting the war in Vietnam. He and a friend were told by a man wearing an "E" button that they could not stand there with their signs but would have to go to Sixth and Chestnut Streets. They were prevented from entering the Mall with their signs at three different locations by men wearing "E" buttons. Jannet was later refused access to the Mall by unifomred policemen after the order was read to them.

Plaintiff Dale Cunningham, a translator of technical materials, entered the Mall area at about 1:10 P.M. with a sign protesting the President's policies in Vietnam. When he held the sign up a man with an "E" button seized and crumpled the sign. Police officers in the area would not assist him in retrieving the sign. He was arrested and taken into custody when he began to take pictures of officers seizing signs despite the fact that Joseph Miller, a corporate executive active in the anti-war movement, informed the police of the TRO. Cunningham was searched, photographed, fingerprinted, denied access to a telephone and kept in custody for more than six hours. During his incarceration he was unable to do translation work for which he charges $50.00 per hour.

Two other plaintiffs, Alan Morrison and Robert Posusney, were arrested by police at the same time and in the same area as Cunningham. Morrison got on the shoulders of Posusney and others and began to address the crowd through a bull horn concerning the war in Vietnam and the action of the police. They were held in custody for five hours and were released without any charges being made.

At approximately 1:00 P.M. Plaintiff Isaac Sletson, Executive Secretary of SANE, was stopped by a member of the Civil Disobedience Squad while walking down the west side of Sixth Street from Market to Chestnut Street with leaflets under his arm. The officer told him that he could go no further with the leaflets. When Sletson protested and attempted to go on he was arrested, searched and placed in a police car. He was released about fifteen minutes later.

Plaintiff William Hutton and a group of between twenty-five and fifty persons, many of whom were carrying signs, were stopped by police at approximately 1:15 P.M. as they walked in a procession east on Chestnut Street towards Sixth. They had previously been demonstrating at the area designated by the police for sign carriers at Fifth and Market Streets. After they were stopped they maintained a picket line where they were, between Sixth and Seventh Streets, for approximatley fifteen minutes when they decided it was futile.

Plaintiff Vincent Klingler went to Independence Mall that day to demonstrate against the war in Vietnam. At approximately 1:20 P.M. he saw a fight break out between Jay Schwartz, another demonstrator, and an unidentified spectator. Several police officers intervened and began to take Schwartz from the area. Klingler ran alongside the officers carrying Schwartz. He screamed to the crowd that they should not permit the police to take Schwartz away. He yelled at the police using derisive terms and obscenities. This took place in the vicinity of a crowd. He touched the arm of the other participant in the fight while

that person was being held by the police. The police took Klingler into custody and held him for approximately five hours without charges.

Plaintiff Lawrence Manuel was denied access to the Mall when he arrived with some leaflets at 11:30 A.M. After he learned of the TRO Manuel returned to the entrance at Sixth and Chestnut Streets and attempted to enter the Mall with a sign. He was rebuffed by six men wearing "E" buttons. He left but came back in a few minutes with other demonstrators. At that time Joseph Miller was speaking with Captain Lindsay and other officers concerning the TRO. Despite the notice of the Court's order, Manuel and the others were refused entrance with their signs, and Manuel was kept out even after he gave up his sign. When he challenged the authority of the officers blocking the steps he was taken away. He was kept in custody for six hours, fingerprinted, photographed and searched, and finally released at 8 P.M. without any charges entered against him.

The policy of the defendants on October 20, 1972 was to exclude all persons with signs and leaflets from the Mall area directly across from Independence Hall. The evidence demonstrates a practice of prohibiting and not mere request as contended by defendants. This policy was in effect both before and after the issuance of the TRO. Neither Lt. Fencl nor Commissioner O'Neill made any attempt to alter this policy after receiving notice of the TRO.

There was no factual basis to justify any of these arrests as necessary to the security of the President or other dignitaries. The police had no information which specified which individuals who were arrested planned any kind of illegal action that day. They did know that many persons planned protests against the war and President Nixon's policies. Defendant Fencl, who claimed that the 10:30 arrests were made on the basis of reports by plaintiff Alan Hardy and undisclosed sources that persons would "confront" the President, had not sought

to learn what was meant by the term "confront", which has many meanings both innocent and sinister. None of the information supported the conclusion that any of these plaintiffs would be involved in an illegal confrontation. There was no information provided to police concerning the possible use of signs in any illegal or threatening manner during the President's visit. The only information which Lt. Fencl had concerning any of the plaintiffs related only to prior activities and organizational affiliation.

The policy of the police to restrict signs to areas other than the Mall directly across from Independence Hall was disturbingly successful. There were practically no signs or leaflets in the Mall area between 11:00 A.M. and 2:00 P.M.[6] Signs finally did appear in appreciable numbers at approximately 2:00 P.M. as President Nixon was leaving the ceremony. These signs were for the most part paper leaflets, 8½ inches by 11 inches, which had been smuggled into the Mall area by Willard McKay and two of his friends under their outer clothing.

The persons who were arrested and those who were denied access to the Mall that day all considered it very important that they be there to demonstrate in a visible manner against policies they thought wrong. They believed that for their views to receive the most attention both from the President and other officials, and from the media, it was necessary to have signs in the area directly across from Independence Hall. This opportunity for legitimate protest was denied by the actions of defendants.

The testimony established that there was a very substantial number of policemen on duty that day. Lt. Fencl indicated he had forty-one men under his command.

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6. We have discounted the testimony of defendants' witnesses who claimed to have seen numerous signs on the Mall between 11:00 A.M. and 1:00 P.M. The videotapes taken by the police show an almost complete absence of signs during that time period. The videotape showed a significant number of signs only at 2:00 P.M.

There were uniformed officers on horses the length of the block on Chestnut between Fifth and Sixth Streets. Many officers were in plainclothes wearing either the "E" buttons or the yellow and blue pins. There were teams of sharpshooters on several surrounding buildings. The Secret Service, of course, also provided a significant number of men. While no exact figures were produced, we must conclude that security was extensive and sufficient to deal with any confrontation planned by the groups in question.

## DISCUSSION

The TRO in this action was entered specifically to protect the rights of those persons who wished to demonstrate peacefully with signs in areas open to the public while President Nixon was in Philadelphia. It was issued in compliance with Fed.R.Civ.P. 65(b)[7] on the basis of a verified complaint and statements by Messrs. Farber and Natali which made it appear that the Philadelphia Police Department was engaged in an intentional attempt to deny access to the area solely on the basis that people were carrying signs. At that time we concluded that such a practice constituted a serious breach of the First Amendment rights of the people involved. The TRO was

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7. Fed.R.Civ.P. 65(b) provides in pertinent part:

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; . . .

necessary to prevent immediate and irreparable harm to such rights since President Nixon was to be in Philadelphia for only a short time.

The testimony produced at the hearings clearly established that the police indeed had a policy to exclude sign carriers from the south side of Independence Mall directly across from Independence Hall. Persons in this area would have the best opportunity to be seen by the President and the media. The policy of exclusion was not intended to protect the President and was not necessary for security. It was rather an attempt to limit visible dissent to an area where it would be inconspicuous and, thereby, ineffective.

Plaintiffs seek to have Commissioner O'Neill, Lt. Fencl and other specific police officers held in civil contempt of the TRO. These persons were all subject to the Court's order. The TRO was issued against Honorable Frank L. Rizzo,[8] Lt. Fencl, John Doe and Richard Roe. It was binding upon the named defendants and "their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them." Fed.R.Civ.P.65(d). The persons who have been named in the contempt petition and hearing were all Philadelphia police officers and clearly within the class of persons enjoined.

Civil contempt is intended to enforce compliance with a court order or to compensate for losses or damages sustained because of a violation of the order. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, (1949); *United States v. United Mine Workers of America*, 330 U.S. 258, 303 (1947). A person is liable for civil contempt when he violates the order *N.L.R.B. v. Crown Laundry and Dry Cleaners, Inc.*, 437 F.2d 290, 293 (5 Cir. 1971), with knowledge that the order has been issued, *United States v. Hall*,

8. Plaintiffs in their Proposed Findings of Fact and Brief in Support of Petition for Civil Contempt admitted that there was a failure of proof as to Defendant Frank L. Rizzo, Mayor of the City of Philadelphia.

472 F.2d 261 (5 Cir. 1972). Neither wilfulness nor formal service are necessary to a finding of civil contempt. Nor is it a defense to civil contempt that one received erroneous advice from counsel. *In re Eskay*, 122 F.2d 819, 822 n.17 (3 Cir. 1941), or a superior, *Nelson v. Steiner*, 279 F.2d 944 (7 Cir. 1960).

The facts established at the hearing demonstrate beyond any doubt that the Philadelphia Police Department engaged consciously and intentionally in conduct which was violative of the TRO. These established facts illuminate a course of conduct by which the police denied entrance to the Mall to anyone they encountered with a sign and harassed those in the Mall who had signs (Dale Cunningham) or opposed their actions vociferously (e.g. Alan Morrison and Robert Posusney). This conduct began before the TRO was signed and continued unabated after the police, both the officers stationed around the Mall and their superiors Commissioner O'Neill and Lt. Fencl, received notice of the Court's order.

The plaintiffs in this action assert merely the right to peacefully demonstrate by means of inoffensive signs against certain governmental policies. The display of these signs was to take place in a public square, open to the public on that occasion. It is clear beyond doubt that the First and Fourteenth Amendments of the Constitution guarantee that persons may peacefully express or propagate ideas, either verbally or otherwise, in areas open to the public. *Flower v. United States*, 407 U.S. 197 (1972); *Organization for a Better Austin v. Keefe*, 402, U.S. 415 (1971); *Brown v. Louisiana*, 383 U.S. 131; *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Jamison v. Texas*, 318 U.S. 415 (1943); *Hague v. C.I.O.*, 307 U.S. 515 (1939).

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9. We do not understand defendants to differ with the principle that persons who carry signs or posters must be permitted into areas to which other members of the public are admitted. Defendants in this case, in fact, entered into a stipulation to that effect in *Friends Peace Committee of the Philadelphia Yearly Meeting v. O'Neill*, C.A. No. 72-992 (E.D.Pa., December 5, 1973) (Broderick,

It is certainly beyond the unfettered discretion of the police to determine when such demonstration is allowed. *See, Cox v. Louisiana*, 379 U.S. 536, 557 (1965); *Saia v. New York*, 334 U.S. 558 (1948); *Hague v. C.I.O., supra.* By police department dictate this right was abrogated on that day although defendants did not establish that the presence of signs on Independence Mall would interfere with the rights or interests of anyone who came to the Mall or to Independence Hall. It was not a policy which was intended to prevent disruptive behavior but was applied indiscriminately against those who wished to exercise their First Amendment rights by the display of anti-war signs in an area open to the public.

The plaintiffs in this case may be conveniently divided into two distinct groups. The first group consists of those persons who were arrested with signs at 7:15 and 10:30 A.M. while in areas open to the public in Independence Mall. They were not released after the Court issued the TRO. The remaining plaintiffs are those who were arrested or were prevented from entering the Mall after the TRO was issued. Both groups contend that actions of defendants towards them after the TRO was entered constituted a violation of that order.

The refusal of police officials and officers to permit persons with signs into Independence Mall after the TRO was read or shown to them was clearly a violation of the court order. It was a wilful continuation of the policy speci-

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Note 9—*Continued*

J.): "IT IS HEREBY STIPULATED AND AGREED that the Defendants, their agents, servants, employees or those subject to their control and direction, in accordance with procedures which now exist will not in any way segregate any persons from any place or any area to which the general public or spectators are permitted on the grounds that they are carrying signs, posters, placards or any other sign or symbol of affirmation, dissent, protest or views, . . ." It was further agreed that such stipulation did not interfere with the right of the police to erect necessary barricades to limit the access of all members of the public to fulfill a valid police function or to prevent entrance to areas private in nature.

fically prohibited by the TRO. This blatant disregard for the court order was shown in the cases of plaintiffs Gary Thomas, Jacqueline Ruttenberg, Linda Backiel, Robert Jannet, Isaac Sletson, Lawrence Manuel and Dale Cunningham. In respect to these plaintiffs the police officers were clearly in contempt.

Several other plaintiffs who base their claims on police actions after the TRO was issued are in a somewhat less clear position. We conclude, however, that in these instances also the actions of the police contravened the Court's order. Plaintiff Hutton was part of a group which attempted to march to Independence Mall with signs after the TRO was in effect. The policies of defendants towards those with signs leads us to the conclusion that Hutton and the others were stopped from proceeding because many of them had signs.

The arrests of plaintiffs Alan Morrison and Robert Posusney were completely unrelated to the possession of signs or leaflets. They were, however, clearly related to the exercise of First Amendment rights which were mentioned in the order. We realize that the government has the authority to make reasonable regulations concerning the manner in which persons express themselves. *See, Saia v. New York, supra; Cox v. New Hampshire*, 312 U.S. 563 (1941). In this instance, however, there has been no showing that the bullhorn used by Morrison was beyond a reasonable range. Nor do we believe that isolated threats of those close by justified the arrest since there was no reason to believe the situation was one which the large number of police in the area could not handle. *See, Edwards v. South Carolina, supra* at 236. Rather, we believe that the police interfered with the expression of Morrison and Posusney for the same policy reasons they prevented signs from coming into the Mall.

The last plaintiff seeking recovery for contempt is Vincent Klingler who was arrested when he attempted to aid Jay Schwartz. We do not find that the record established sufficiently that the police action toward Klingler

was aimed at suppressing his First Amendment rights. klingler was screaming abuse at officers and urging on the bystanders to interfere. This is not speech protected by the First Amendment. *See, Feiner v. New York*, 340 U.S. 315 (1951); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

The persons arrested in the morning of October 20, 1972 present a different problem.[10] They were arrested before the order was issued and, obviously, their arrests were not in violation of it. Plaintiffs contend, however, that once the TRO was issued the police had the responsibility to release them.

The arrests in the morning were made because persons with signs would not move from the south side of the Mall directly across from Independence Hall. This area was not a security area and it was open to the public. The police did not have probable cause to suspect that any let alone all, of the persons taken into custody presented a serious "security risk".[11] Rather, the arrests were made in an attempt to prevent these persons from demonstrating in a visible manner and in a conspicuous place their dissent from the policies of President Nixon.

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10. The police contention that these persons, who were held in cells for up to nine hours, fingerprinted and photographed, were not arrested and therefore not protected by the probable cause requirements of the Fourth Amendment is ludicrous. The detention of these persons over such a period was clearly a "seizure" within the Fourth Amendment, subject to the protections of that amendment. *See, Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968). This is sufficient for our purpose.

11. We reject completely defendants' contention that its actions were justified by the past activities of some plaintiffs at demonstrations and by the uncorroborated reports of unidentified informants. The term "security risk" is not a talisman by which constitutional limitations are erased and police are given a free hand. *See, United States v. United States District Court*, 407 U.S. 297 (1972). The actions of plaintiffs at prior demonstrations may not be used to deprive them of the opportunity to exercise their First Amendment rights. The police cannot be given the unfettered right to suppress demonstrations because they consider them risky from prior experi-

The TRO was issued to prevent exactly this type of suppression. The persons being held in custody were arrested for actions clearly within the protection of the order. When the order was handed down, the police were aware of the true reasons for which they were being held. The continued confinement denied to these plaintiffs the benefit of the order handed down in their name. We believe that the police officials, aware of the reasons for which they were being held and aware that the Court's order protected such activity, had the responsibility of releasing these persons and permitting them to exercise their rights including the carrying of signs in Independence Mall. The actions of the police, however, denied them the opportunity.

Defendants argue that they should not be held in contempt for failure to release the persons arrested in the morning because the Court specifically eliminated such a provision from the proposed TRO submitted to it by plaintiffs. This was done out of a concern for the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). At that time we did not have what we considered sufficient evidence to interfere with a state action which might well have resulted in criminal proceedings. At this time, however, we do have sufficient evidence that these arrests were made for no legitimate purpose and that defendants never seriously contemplated bringing

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ence. *See, Kunz v. New York*, 340 U.S. 290, 294-5 (1951); *see also, New York Times v. United States*, 403 U.S. 713 (1971); *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952). There was a very substantial amount of police protection available to guard against any organized action which might be taken. *See, Edwards v. South Carolina*, 372 U.S. 229, 236 (1963). The defendants did not attempt to get a judicial authorization for the detention of plaintiffs, although several hours were available to them. *See, Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The information on which they claimed to rely did not satisfy the standards established by the Supreme Court in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 394 U.S. 108 (1969, to establish that illegal activities were about to take place.

criminal proceedings against them. The police, however, were always in possession of this information. They knew that these arrests were made to prevent these persons from demonstrating with their signs. To continue this detention was to continue the denial, which violated the TRO once defendants received notice.

Plaintiffs seek damages from defendants for the deprivation of their First Amendment rights. These damages would be compensatory for the damages caused by the violations. *See United States v. United Mine Workers, supra.* Courts may award compensatory damages to plaintiffs who are deprived of constitutional rights. *See e.g., Basista v. Weir,* 340 F.2d 74 (3 Cir. 1965); *Donovan v. Reinbold,* 433 F.2d 738 (9 Cir. 1970); *Sexton v. Gibbs,* 327 F.Supp. 134 (N.D. Tex. 1970). The value of such rights, while difficult of assessment, must be considered great. *Cartright v. Resor,* 325 F.Supp. 797, 810 (E.D.N.Y. 1971); *see, Spock v. David,* 469 F.2d 1047, 1053 (3 Cir. 1972). We also agree with plaintiffs that they should be awarded reasonable attorneys fees and costs. *Crandall v. Conole,* 230 F.Supp. 705, 715-16 (E.D.Pa. 1964); *Lance v. Plummer,* 353 F.2d 585, 592 (5 Cir. 1965); *Nelson v. Steiner,* 279 F.2d 944, 948 (7 Cir. 1960).

We reject defendants' contention that Lt. Fencl and Commissioner O'Neill cannot be held liable. The facts established at the hearing demonstrated that Lt. Fencl and Commissioner O'Neill were aware of and directed the exclusion of persons with signs from the Mall area. When they were informed of the Court order they admittedly did nothing to change the policies in effect that day. Such actions or omissions on their parts make them liable for violations of the injunction which resulted from their orders or failure to take action. *Via v. Cliff,* 470 F.2d 271 (3 Cir. 1972). Captain Lindsey, Lt. Rich, Sgt. Carducci and the other police officers are liable to various individuals whom they personally injured.

Although we have found defendants in contempt of our order and liable for compensatory damages, we shall

not impose damages at this time. There is currently a civil action in this same case pending before us. We shall await the outcome of that action before imposing damages.

We consider this case a most serious one. It has brought before the Court a contempt for the law by those officials charged with maintenance of the law. Defendants not only violated the First and Fourth Amendment rights of plaintiffs and others, but also they continued such actions in the face of a court injunction. While we are mindful of the difficulties with which policemen are faced in crowd situations, and this nation's tragic recent past, these concerns cannot be used as a smokescreen behind which government is permitted to suppress peaceful free expression. That is what defendants attempted and for that we must censure them.

Plaintiffs shall submit a proposed order in conformance with this memorandum within ten (10) days.

IT IS SO ORDERED.

J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN G. FARBER, et al.

Civil Action

*v.*

No. 72-2052

FRANK L. RIZZO, individually and as Mayor of the City of Philadelphia, et al.

**AMENDED OPINION AND ORDER**

NOW, June 29, 1973, IT IS ORDERED that the Opinion and Order of June 22, 1973 is amended as follows:

The number "2752" on line 5 of page 8 is changed to "2751".

J.

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN G. FARBER, et al.

*v.*

FRANK L. RIZZO, individually and as Mayor of the City of Philadelphia, et al.

Civil Action

No. 72-2052

**ORDER**

And now, to wit, this 29th day of June, 1973, in accordance with the opinion of the Court filed on June 22, 1973, and for the reasons stated therein, IT IS HEREBY ORDERED THAT:

1. Police Commissioner Joseph O'Neill and Inspector George Fencl are in contempt of court for violating the Temporary Restraining Order (TRO) with respect to the plaintiffs Miles Day, Michael Brennan, Ray Ravitz, Richard Malone, Kevin McVee, Rich Seeber, Lisa Schiller, Alan Hardy, Eldon Pratt, Gary Freeman, Riley Doty, Harold Driscoll, Mary Bye, Joan Avila, Ken Campbell, Chris Windle, Regina Puston, Terry Buckalew, James Halasa, Derek Klotz, John Haydt, Dean Tuckerman, Barry Smiler, Jeff Seaman, Charles McHugh, Bob Dickinson, Carol Ann Aldred, Eva Kryszak, Donna Palumbo, Jayma Abdoo, Dale Cunningham, Alan Morrison, Robert Posusney, and Isaac Sletson.

2. Commissioner O'Neill, Inspector Fencl, Lieutenant Rich, and officers Martin Kelly ( #4288), William Hughes ( #4038), Ned Wimberly ( #6821), Melvin Jones ( #4158), and O'Donnell ( #5433) are in contempt of court for violating the TRO with respect to the plaintiff Gary Thomas.

3. Commissioner O'Neill, Inspector Fencl, Lieutenant Rich, and officers Ellsworth Kiehn ( #4345), John Founds ( #9771), and Raymond Weldon ( #2751) are in contempt of court for violating the TRO with respect to the plaintiff Linda Backiel.

4. Commissioner O'Neill, Inspector Fencl, Lieutenant Rich, Captain William Lindsay, and Sergeant Michael Carducci are in contempt of court for violating the TRO with respect to plaintiffs Steven Farber, Laurence Manuel, Jacqueline Ruttenberg, Robert Jannet, and William Hutton.

5. The complaint for civil contempt on behalf of Vincent Klingler is dismissed.

6. For any damages that may be assessed for the violations of the TRO at the conclusion of testimony in Civil Action No. 72-2052 the named police officials and officers shall be jointly and severally liable to the individual plaintiffs whose rights they violated as stated in 1-4 *supra*.

J.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1738

September 7, 1973

STEVEN G. FARBER, *et al.*

*v.*

FRANK L. RIZZO, etc., *et al.*

Police Commissioner Joseph O'Neill, *et al.*,

*Appellants*

(D. C. Civil No. 72-2052)

(See attached sheet for complete caption)

Present: KALODNER, ALDISERT and GARTH,
*Circuit Judges*

1. Motion by Steven G. Farber, et al., appellees, to quash appeal with Memorandum in support of motion.

2. Appellants' answer to motion to quash appeal and Memorandum in opposition to motion to quash appeal.

in the above listed for Monday, September 17, 1973.

Respectfully,

enc.
fm

Clerk

The foregoing Motion is granted

By the Court,

Dated: September 26, 1973

Judge

IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-992

FRANK L. RIZZO, *et al.*,

*Petitioners*

*v.*

STEVEN FARBER, *et al.*,

*Respondents*

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## COUNTER-STATEMENT OF THE ISSUE PRESENTED

Whether an appeal lies from an adjudication of civil contempt, where the appeal is taken prior to the imposition of sanctions and where the appealing parties are also parties to the underlying, pending, civil suit.

## COUNTER-STATEMENTS OF THE FACTS

Petitioners, all police officials and officers, appealed to the court below from a finding of civil contempt for violation of a temporary restraining order entered in conjunction with a duly filed civil complaint. Respondents' motion to quash this appeal was granted by the court below on September 26, 1973, and the propriety of that ruling is challenged by petitioners.

Petitioners concede that their appeal was taken prior to the imposition of damages (Petition, at 7), the trial court having postponed sanctions until the close of testimony in the underlying civil action. (See opinion of the District Court, Petition, A. 19-20). The relief sought in the civil action included money damages and a permanent injunction restraining defendants—including petitioners—from the acts complained of.

Petitioners are all officials and/or police officers of the City of Philadelphia, and both the civil complaint and the violated temporary restraining order applied by their terms to all of them. (See opinion of the District Court, Petition, A. 13). Each petitioner, including those police officers whose identities became known at the contempt hearing, are defendants in the underlying civil action, with consequent rights of appeal at the conclusion of that litigation. Indeed, petitioners themselves concede that their appeal is "interlocutory," (Petition, at 1).

## ARGUMENT

Petitioners' appeal to the court below was clearly interlocutory, and was quashed on two well settled grounds: first, the appeal was taken prior to the assessment of damages, e.g., *S.E.C. v. Naftalin*, 460 F.2d 471, 475 (8th Cir. 1972); and, second, contempt adjudications as to parties are reviewable only on appeal from a final judgment and decree in the underlying civil suit, e.g. *S.E.C. v. Naftalin, supra; Hodgson v. Mahoney*, 460 F.2d 326 (1st Cir. 1972); *Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc.*, 463 F.2d 101, 102-3 (2d Cir. 1972); Cf. *Catlin v. United States*, 324 U.S. 229 (1945); *New York Telephone Co. v. Communications Workers*, 445 F.2d 39 (2d Cir. 1971).

### A. Petitioners are all parties to the underlying civil action and for this reason their appeal did not lie prior to a final order and decree in that litigation.

Petitioners concede, as they must, that if they were parties to the underlying civil action, their appeal is not permitted at this time. (Petition, at 8).

As is indicated in the opinion of the District Court, the flagrantly violated temporary restraining order applied by its terms, and the provisions of Rule 65(d), Fed.R.Civ.P., to each and every petitioner by virtue of the fact that all are Philadelphia police officers and/or officials. (Petition, A. 13). The injunctive relief sought in the civil complaint is clearly directed at these same Philadelphia police officers, who were continuing to violate the First Amendment rights of plaintiffs at and after the time the TRO was entered. For this reason, any final decrees in this lawsuit will clearly apply to all petitioners, and their contention that they are non-parties to the underlying civil litigation is clearly frivolous.

Petitioners contend that their non-party status arises from respondents failure to amend the pleadings once petitioners' actual identities became known. (Petition at 8). While petitioners do not indicate whether the "pleading"

referred to is the civil complaint as opposed to the petition for civil contempt, their argument, in either case, is factually incorrect. As to the civil contempt petition, their trial counsel stipulated to the actual identity of each "John Doe" contemnor and expressly agreed that their actual names be made a matter of record. (See Transcript 411-413 and stipulation attached hereto at Appendix, A1). This stipulation was entered into *prior* to defense testimony at the contempt hearing, and each petitioner was clearly on notice at that time as to their status both as putative contemnors and as civil defendants; and, more important, as parties entitled to appeal *after* a final order and decree in the underlying civil suit. Moreover, respondents filed a motion to amend the civil complaint by substituting the actual names for the "John Doe" appellations of the original civil complaint. This motion, which would merely conform the civil complaint to the stipulation agreed to by petitioners' counsel, is currently pending in the trial court.

**B. The civil contempt sanctions having been deferred pending final rulings in the civil action, the adjudications of civil contempt were not final orders under 28 U.S.C. Sec. 1291.**

Contemnor-petitioners concede, as they must, that no civil contempt sanctions have as yet been imposed. (Petition, at 7, A. 19-20). For this reason, even assuming *arguendo* their alleged "non-party" status, their appeals were premature. *Fireman's Fund Ins. Co. v. Myers*, 439 F.2d 834, 838-9 (3rd Cir. 1971); *S.E.C. v. Naftalin, supra.*

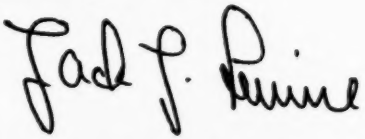
**C. Issues unrelated to the appealability of the contempt rulings are not properly raised in this Court.**

Petitioners have challenged the "tacit acceptance" by the court below of "John Doe" pleadings. (Petition, at 10-13). No issues relating to "John Doe" pleadings were adjudicated in proceedings before the court below, and the only issue properly raised in this Court relates to the ruling of the Third Circuit quashing petitioners' appeal.

## CONCLUSION

For the reasons stated above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,



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# APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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FARBER, *et al.*

*v.*

Civil Action No.
72-2052

RIZZO, *et al.*

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## STIPULATION

It is hereby stipulated by and between counsel for the parties in this case that the following list of police officers and their respective badge numbers may be entered into the record of this case. See N.T. 411-413.

#4288 Martin Kelly, 90th District
#4038 William Hughes, 90th District
#6812 Ned Wimberly, 90th District
#4158 Melvin Jones, 90th District
#8552 Michael Carducci, Academy
#4345 Ellsworth Kiehn, 91st District
#9771 John Founds, 23rd District
#2751 Raymond Weldon, Marine Unit

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SUPREME COURT, U. S.
JAN 31 1974
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1973

No. 73-992

FRANK L. RIZZO, MAYOR OF THE CITY OF PHILADELPHIA, et al., POLICE COMMISSIONER JOSEPH F. O'NEILL, et al., *Petitioners*

*v.*

STEVEN G. FARBER, et al., *Respondents*

## Reply Brief In Answer To Respondent's Brief In Opposition

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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## ARGUMENT

Petitioners respectfully submit this Reply Brief to this Honorable Court for the purpose of responding to several erroneous factual and legal assertions conveyed to this Court by respondents in their brief. Respondents' brief can best be characterized as a weak attempt at concealing the substantive issues presented herein; while, concurrently, seeking to suppress the constitutional rights of petitioners.

Initially, it must be pointed out that, as a matter of law, respondents' position is untenable. On page 4 of their brief, respondents make the following statement:

> Contemnor-petitioners concede, as they must, that no civil contempt sanctions have as yet been imposed. (Petition, at 7,A. 19-20). For this reason, even assuming *arguendo* their alleged 'non-party' status, their appeals were premature. *Fireman's Fund Ins. Co. v. Myers*, 439 F.2d 834, 838-9 (3rd Cir. 1971); *S.E.C. v. Naftalin, supra.*

Contrary to respondents' assertions, neither of the cited cases is controlling in the issues at bar. While these cases may well stand for the general proposition that as to named parties, an interlocutory contempt order is not appealable; they have no vitality in determining the appealability of such an order directed against a non-party since, *inter alia*, they never discussed the issue.

Respondents attempt to create an inference that petitioners are named party defendants to the contempt litigation. On pages 3 and 4 of their brief, respondents make the following statements:

> Petitioners contend that their non-party status arises from respondents failure to amend the pleadings once petitioners' actual identities became known. (Petition at 8). While petitioners do not indicate whether the

'pleading' referred to is the civil complaint as opposed to the petition for civil contempt, their argument, in either case, is factually incorrect. As to the civil contempt petition, their trial counsel stipulated to the actual identity of each 'John Doe' contemnor and expressly agreed that their actual names be made a matter of record. (See Transcript 411-413 and stipulation attached hereto at Appendix, A1). This stipulation was entered into *prior* to defense testimony at the contempt hearing, and each petitioner was clearly on notice at that time as to their status both as putative contemnors and as civil defendants; and, more importantly, as parties entitled to appeal *after* a final order and decree in the underlying civil suit. Moreover, respondents filed a motion to amend the civil complaint by substituting the actual names for the 'John Doe's appellations of the original civil complaint. This motion, which would merely conform the civil complaint to the stipulation agreed to by petitioners' counsel, is currently pending in the trial court.

Reduced to its simplest terms, respondents argue that a contorted trial stipulation can form a constitutionally acceptable substitute for procedural due process. They also suggest that an amendment to their pleadings, moved for after the appeal was taken, can cure this defect.

It is submitted that neither of these arguments form a valid basis for denying this Petition. However, both arguments will be separately repudiated.

Respondents seek to distort a trial stipulation regarding the identity of various police officers into an explicit agreement to make petitioners party defendants. It is submitted that the stipulation speaks for itself and that common usage of the English language makes clear that the interpretation attempted to be ascribed to by respondents cannot be drawn, even by connotation, from the words of the stipulation.[1]

1. See Appendix for relevant pages of notes of testimony.

To the contrary, it can be shown that respondents' interpretation of the stipulation was never envisioned by either the parties or the District Court. For the stipulation to have the effect that respondents assert, and in order to comply with notice requirements of procedural due process, a waiver of service is required. There is no such waiver here.

Respondents subsequent acts, to wit; their motion to amend the pleadings to include petitioners, emphasizes the inconsistency of their present construction of the stipulation. Thus, the necessity for such an amendment to join petitioners as party defendants would have been obviated. Furthermore, even assuming that respondents correctly interpret the stipulation, petitioner O'Donnell is still not a party since he was neither identified in respondents' pleadings nor in the stipulation.

This leads to the inevitable conclusion that their argument is nothing more than an attempt to conceal or confuse the actual facts in this proceeding.

Moreover, the matter of respondents' proposed post-trial and post-appeal amendment to the complaint is not before this Court, and has been improperly raised by respondents. This is an appeal from the Third Circuit Court's order of September 26, 1973. Respondents' proposed amendment was not filed until October 18, 1973,[2] after the Third Circuit improperly dismissed the appeal.

Finally, respondents argue that issues relating to "John Doe" pleading were not adjudicated below and, hence, are not proper issues before this Court. To the contrary, these issues came to the forefront when the District Court held the petitioners in contempt of court, on the basis of the "John Doe" pleading, notwithstanding their never being served with process or being made parties to the action. As such, the question of the propriety of this form of pleading, as well as the validity of the pleadings themselves, was presented to the Third Circuit. Thus, respondents' contention that the issue is not properly before this Court is without merit.

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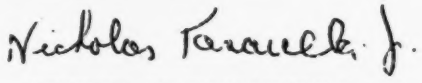
2. See Appendix for relevant docket entries.

## CONCLUSION

In view of the foregoing, respondents' brief cannot form the basis for a denial of a writ of certiorari to review the judgment and order of the Third Circuit.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, JOHN MATTIONI, Deputy City Solicitor, do hereby certify that three copies of the Petitioners' Reply to Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit were served on Jack J. Levine, Esquire, attorney for respondents, by hand, on January 31, 1974.

JOHN MATTIONI
*Deputy City Solicitor*

## RELEVANT DOCKET ENTRIES

1973

| | |
|---|---|
| June 22 | Opinion Huyett, J. re: findings in contempt as to Lt. Fencl et al, plffs shall submit a proposed order in conformance with the memorandum within (10) days, filed 6/22/73 entered and copies mailed. |
| June 29 | Order AMENDING Opinion and Order of 6/22/73, filed. 7/3/73 entered and copies mailed. |
| June 29 | Order that Police Com. Joseph O'Neill & Inspector George Fencl are in contempt of court for violating Temporary Restraining Order, with respect to Plffs. Miles Day, et al; etc., filed 7/3/73 entered and copies mailed. |
| Jul. 16 | Dfts, notice of appeal, filed. |
| Jul. 16 | Copy of Clerk's notice to U. S. Court of Appeals, filed. |
| Aug. 3 | Original record transmitted to the U. S. Court of Appeals. ( #72-2052) |
| Sept. 26 | Certified copy of Order of 9/26/73 from the U.S.C.A. that Motion by Steven G. Farber, et al, to quash appeal with memorandum in support thereof, and appellants' answer to motion to quash appeal and memorandum in opposition to motion to quash appeal,—the foregoing motion is GRANTED, filed. |
| Oct. 18 | Plff's motion to allow amendments to complaint, brief in support thereof, certificate of service, filed. |
| Oct. 18 | Dfts. answer to motion to allow amendments to complaint, filed. |

**Excerpts of Hearing of December 6, 1972**

* * *

MR. GOLDMAN: We would agree to that, except for the characterization of an arrest. I think that's a matter for the Court. They were taken into custody.

THE COURT: Other than the technical use of that word. They were taken into custody and so held and all the rest of it is agreeable to the City, is that correct?

MR. GOLDMAN: That is correct.

THE COURT: I will approve the stipulation.

MR. GOLDMAN: Thank you, sir.

MR. RUDOVSKY: Two other matters. I have requested Mr. Goldman and he has agreed—

MR. GOLDMAN: Mr. Farber was released at 9:30.

MR. RUDOVSKY: Certainly.

MR. GOLDMAN: All right.

MR. RUDOVSKY: Mr. Goldman has indicated to us that he will provide us with names of the police officers who our witnesses have identified by badge numbers and they become available to him. We would ask leave of the Court although we are requesting to enter the names of those persons into the record when they become available.

THE COURT: Any objection, Mr. Goldman?

MR. GOLDMAN: No, sir.

THE COURT: How will you do that?

MR. RUDOVSKY: The best thing to do would be a stipulation, perhaps by letter, to the Court to be made part of the record and we just suggest that we list the numbers

of the police officers that the witnesses have testified to and put their names next to them.

THE COURT: By stipulation of counsel, very well, that is—

MR. RUDOVSKY: I would also request that any other officers who have been described by description who were not named or identified be made available to us, if they become available to Mr. Goldman.

MR. GOLDMAN: The descriptions that were received are so vague that I can't promise to assist in that matter.

THE COURT: If you learn who those officers are, would you then advise the plaintiffs?

MR. GOLDMAN: Yes.

THE COURT: Assuming you obtain that information.

MR. GOLDMAN: Yes, sir.

THE COURT: And that may be made part of the record by stipulation, also.

MR. RUDOVSKY: The final matter concerns Lt. Rich. I spoke to Mr. Goldman and indicated we would want to call him as our next witness. Apparently he is out of the City and would be there until January 1st. We are willing to rest and we would ask leave of the Court for permission to open our case later if we determine we need his testimony either during or after the defendant presentation.

THE COURT: Any objection?

MR. GOLDMAN: No.

THE COURT: That is in that event, the plaintiff 's rest their case.

THE COURT: Would you proceed, Mr. Goldman.

MR. GOLDMAN: The first witness will be Captain Lindsay, previously sworn.

THE COURT: Would you give your name?

THE WITNESS: Captain William Lindsay, number 66.